?BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

%DATED: 14.11.2018

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THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

+W.P.(MD)No.9686 of 2010
and
M.P.(MD)Nos.1 and 2 of 2010

#S.Sugumar
... Petitioner

Vs.

$The Assistant Commissioner,
Central Excise ? II Division,
No.1, Williams Road,
Cantonment,
Trichirapalli~620 001. ... Respondent

PRAYER : Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari to call for the records of the respondent in order in original dated 06.03.2007 in C.No.IV/09/36/2006/ST.Adj./Order No.06/2007~ Service Tax and quash the same as illegal, without jurisdiction and against the provisions of the Act.

!For Petitioner : Mr.G.Karnan
^For Respondent : Mr.S.Gurumoorthy
Standing Counsel

:ORDER

The petitioner was a contract carriage operator. He was owning two buses which were given on contract basis to two companies. The period in question is from September, 2004 till December, 2005. The question arose as to whether the petitioner is liable to pay service tax. Notice was issued to the petitioner. He appeared before the respondent. The petitioner did not dispute his tax liability. Therefore, the respondent refrained from levying any penalty. But then, the respondent confirmed the demand of service tax of Rs.94,041/~ and education cess of Rs.1881/~. Orders to that effect were passed on 06.03.2007. The same is challenged in this writ petition.

2.Heard the learned counsel on either side.

3.The learned counsel appearing for the petitioner pointed out that his brother S.Selladurai was also a contract carriage operator like him. When a demand was levied on the petitioner-s brother, he challenged the same before

the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai. By order dated 07.09.2009 in S/164/2007/MAS, the order passed by the respondent was set aside.
4.The petitioner-s contention is that he is also identically placed.
He also pointed out that on the earlier occasion, this Court called upon the learned Standing Counsel to find out if the aforesaid order dated 07.09.2009 passed by the CESTAT, Chennai, was challenged by the respondent. The learned standing counsel appearing for the respondent is unable to confirm as to whether the order passed in favour of Selladurai was challenged or whether it has become final.

5.However, the learned standing counsel for the respondent pointed out that the issue on hand is no longer res integra. The Hon-ble Division Bench of the Hon-ble Madras High Court in the decision reported in 2002 (5) CTC 547 in the case of The Secretary, Federation of bus Operators Association of Tamil Nadu, Chennai~4 Vs Union of India, represented by Secretary to Government, Ministry of Finance, Department of Revenue, New Delhi and two others, had answered the issue in favour of the Revenue. But then, while dismissing the writ petitions filed by the stage carriage operator, contract carriage operators, cab/maxi cab operators and rent~a~cab scheme operators, the Hon-ble Division Bench observed that the dismissal of the writ petitions would subject to the rider set out in Paragraph 36. Paragraph ~36 reads as under:
?36.At this stage, all the learned counsel pointed out that the petitioners- spare buses may not be the ?tourist vehicles? within the meaning of Sec.2(43) of the Motor Vehicles Act and therefore, they are not liable. Indeed, if the vehicles owned by the petitioners are not the ?tourist vehicles? within the meaning of Sec.2(43) of the Motor Vehicles Act read with Rule 128 of the rules framed thereunder then, such petitioners would not be required to be registered under the Finance Act. The learned senior counsel for the Department very fairly accepted this position. However, he pointed out that it would be for the petitioners to raise their objections before the concerned authorities under the Finance Act and their objections would be decided upon. Therefore, the petitioners are permitted to raise the objections before the concerned authorities issuing the notices and the authorities will decide as to whether the petitioners- vehicles are the ?tourist vehicles?as contemplated under Sec.2(43) of the Motor Vehicles Act, which is sine qua non for the application of the Finance Act. Needless to mention that if they are not the ?tourist vehicles? , the provisions of the Finance Act would not apply and more particularly the provisions of Sec.65(51) and the other allied sections like Sec.66(3), etc.?

6.The learned Standing Counsel also drew my attention to the fact that this Hon-ble Division Bench decision was also followed in Sri Pandyan Travels Vs. CCE, Chennai II 2004 (163) ELT 409 (Mad), dated 22.08.2003. The decision rendered in favour of the petitioner-s brother in S/164/2007/MAS dated 07.09.2009, cannot come to the petitioner-s rescue for the simple reason that it is clearly not in consonance with the judgment passed by the Hon-ble Division Bench of the Madras High Court. The CESTAT, Chennai chose to follow the decision rendered by CESTAT, Delhi in CCE/ELT/Gayathri Enterprises.

7.When a binding decision of the Hon-ble Division Bench of the Madras High Court is available, it would be absolutely improper for me to go by the decision rendered by CESTAT, Chennai. I was initially inclined to remit the matter on the ground that the decision laid down by the Hon-ble Division Bench was not considered by the authorities. I am not in a position to do so, because the writ petitioner himself admitted his tax liability before the authorities. Therefore, at this point of time, it will be simply impossible to conduct a factual investigation.

8.It is also to be noted that the order impugned in the writ petition was passed on 06.03.2007. The writ petition itself came

to be filed only on 26.07.2010. There is thus gross delay and laches in the very filing of the writ petition.

9.Looked at from many angle, I am of the view that the order impugned in the writ petition has to be sustained. Hence, this writ petition is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

To

The Assistant Commissioner,
Central Excise ? II Division,
No.1, Williams Road,
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